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Panel III: Politics and the Public in IP & Info Law Policy Making

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PANEL III: POLITICS AND THE PUBLIC IN IP & INFO LAW POLICY MAKING

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MICHAEL BURSTEIN: We have been moving gradually from the theoretical to the practical. Having examined the impact of critical legal studies (“CLS”) in the academy and having discussed the intersection between scholarship and activism, we now turn to the nitty-gritty questions of how to actually enact change in intellectual property and information law and policy.

It seems that the political economy of intellectual property and technology policy has changed in very interesting ways that pose certain challenges to actors in this space. To oversimplify a bit, tech policy used to be somewhat easier to understand in the 1990s and I think even into the early 2000s. It tended to be somewhat siloed—which is to say that issues were more distinct from one another—within each issue you could tell a relatively straightforward story about how policy developed based on social choice theory, political economy, and competing interest groups. For example, in 1998 the Copyright Term Extension Act was pushed by the content industries, who were able to exert enormous influence in Congress as compared to a relatively dispersed and unorganized group of folks who were on the other side. With respect to telecom policy in the 1996 Telecommunications Act, the Bells were running the show for the most part, pushing against somewhat more organized interests among Congress people but by and large they sort of shaped that legislation and in particular shaped the litigation that led to its mostly demise in the years immediately following passage. And the folks who were interested in telecom policy and the folks who were interested in copyright policy for the most part didn't talk to one another. These two pieces of legislation were the product of legislative compromises between largely distinct actors. This

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is no longer the case. The simple world, to the extent that it was simple of the 1990 is, has been complicated in I think at least three ways.

One is the number of players and their interests, so the arrival on the scene of tech policy of companies like Google and Facebook that have their hands in multiple issues and that are distinct from the traditional industry incumbents such as Hollywood on the one hand and say telecom or cable providers on the other hand. We've also seen the maturation of the public interest community in this space. Organizations like Public Knowledge and the Electronic Frontier Foundation have come into their own as forces in tech policy. And of course we've seen the rise of a grassroots or netroots movement that uses technology, and tends to be much more organized than the sort of disparate public interest or grassroots type movements that attempted to gin up opposition to copyright extension or to telecommunications reform in the 1990 is.

The second way in which the world has become more complicated is the range of issues that people who are interested in this space have to confront and the ways in which they interact with one another. So these issues have all moved out of their silos. So now if one is interested in tech policy, one can't for the most part be interested solely in telecommunications regulation or solely in copyright.

One has to have one's hands in each of these issues because they're all very much interrelated. And they're also bound up with a range of new issues, things like cyber security, things like free expression, that has become of much greater salience than it was in years past, and even things like entrepreneurial policy and funding concerns. Tech policy activists find themselves talking about securities regulation when they talk about the Jobs Act and whether or not the securities laws can accommodate things like crowd funding.

Finally, the number of forums in which these issues are debated and in which policy is actually made have become somewhat more complicated. So it is no longer just Congress and the regulatory agencies; there are private sort of self-help measures that are deeply enmeshed in policy questions. Much of policy has shifted to the international stage, to negotiations for treaties between the United States and other nations. New regulatory actors have become much more powerful. The Copyright Office itself, which used to be a ministerial office responsible solely for copyright registrations, has now taken an active role in policymaking as the result of many new statutory innovations.

To guide us through this complex world; we have a terrific set of panelists before us.

Derek Khanna is a Visiting Fellow at the Yale Information Society Project. He is also a Policy Advisor to the Department of Defense

Science Board on Cyber Security and he is a J.D. candidate at Georgetown. And Derek comes to us from a background as a Congressional staffer. So he was on the staff of the Republican Study Committee and is the author of the now notorious paper that was mentioned on the last panel in which Derek advocated for copyright policy based on weaker copyright protections, a position completely consistent with conservative free market principles but anathema to the incumbent industries who are concerned with this particular policy area.

Jessica Litman is the John F. Nickoll Professor of Law at the University of Michigan. Her distinguished academic career has taken her to Michigan, to Wayne State University, to NYU, American University and to the University of Tokyo. Jessica has in many ways bridged the gap between academics and activism both in her writings which include some of the seminal critiques of copyright in the digital world and in her work outside of the academy where she has served on the Advisory Boards of Public Knowledge, the IP and Internet Committee of the ACLU and the Advisory Council of The Future of Music Coalition, among many other extracurricular endeavors.

Sherwin Siy is the Vice President of Legal Affairs at Public Knowledge where he coordinates the organization's work on copyright issues. He was previously staff counsel at EPIC, the Electronic Privacy Information Center. So these are organizations that have really emerged at the forefront of public interest work in technology policy. And his current employer, Public Knowledge, is actively involved in legislative debates, rulemaking proceedings, and litigation over a variety of tech policy issues.

And finally Rick Whitt is the Vice President and Global Head of Public Policy and Government Relations at Motorola Mobility. Prior to that position he was at Google for more than five years serving as Director and Managing Counsel for Federal Policy and for Telecom and Media Policy. So Rick has spent much of his career in the trenches in Washington representing some of the leading technology companies before Congress and Federal agencies concerning IP, privacy, cyber security, free expression, and internet governance issues.

Rick has also written a terrific paper that the AELJ is going to publish that advocates for better alignment between the logical structure and the functional structure of the internet and the governance regimes to which it is subject. So with that brief introduction, I'm going to turn it over to the panelists and invite each of them to spend about ten minutes or so sort of reflecting on the state of telecom policy and the political economy of intellectual property and tech policy and what we can do actually to enact change in these areas?

DEREK KHANNA: I'm Derek Khanna and I wrote the memorandum on

copyright reform for the Republican Study Committee (“RSC”). What the last panel left out of the story is that two weeks after the RSC released my memorandum I was told that I would not be retained as a staffer—which is why I no longer work on Capitol Hill.

I wanted to briefly touch on the memorandum that I wrote for the RSC because I think it frames some of the issues that we’re talking about here on how to move forward on intellectual property issues. First, in contrast to the previous panelist’s characterization of the memo, I wouldn’t really describe it as advocating for being weaker on infringement of intellectual property. I think it’s more about jiggering the way we look at intellectual property law.

I think most law students who encounter copyright law for the first time probably ask themselves, “What rational system could have come up with this regime of copyright, this hodgepodge, where if the content is from the 1920s then you have this one system of laws, but if the content was a corporate work or after 1920s, you have a different system of laws?” I don’t think that any student can really parse through it and conclude that it is logical. The reason is because there isn’t a logical coherent theory that strings it all together.

Instead, it’s the result of lobbyists that have succeeded in perverting the law and perverting the way that we frame issues that relate to copyright. I’ve written that success in perverting the law, in perverting how we frame these issues and think about these issues, should not be confused with constitutional fidelity. Just because these lobbyists, such as the Motion Picture Association of America (“MPAA”) and the Recording Industry Association of America (“RIAA”), are using 18th Century vernacular does not actually make the policy they are espousing consistent with constitutional principles. So if lobbyists saying things like “natural rights” or “property rights,” that doesn’t actually, magically, make their policy constitutional or consistent with our Founding Fathers’ intent.

My memorandum, which ultimately led to my no longer being a staffer on the Hill, talked about a series of myths in how we frame copyright issues. The first myth is that copyright is free market capitalism at work. I argued that instead it’s a guaranteed government-instituted, government-subsidized content monopoly. The second myth is that the current copyright legal regime leads to the greatest innovation and productivity. I argued that copyright is a Goldilocks-like balance: we want some copyright, but not too much. And, whereas too much copyright can stifle innovation and content, not enough of it can stifle content creation. I argued that our current poorly-crafted implementation of copyright has resulted in the hindering of a whole variety of types of innovation.

Specifically, my memorandum advocated for reforming statutory

damages, expanding fair use, dealing with false takedown requests under the DMCA, and limiting the term-length of copyright to 46 years. After my memorandum was released, it was endorsed by many major conservative organizations, with The American Conservative Union (“ACU”) even putting it up on their website. Unfortunately, within 24 hours, the RSC removed the memorandum from its website. Shortly thereafter, my memorandum became ridiculed by some critics and industry lobbyists who referred to me as a Marxist because I was advocating going back to the Constitution and figuring out what actually leads to the most economic growth.

So, after I left Capitol Hill, I wanted to figure out the best way to move forward on intellectual property reform. When I was on Capitol Hill I tried to frame the debate and talk about broad, high-level ideas for the optimal way to approach reforming our entire system of copyright. But off of Capitol Hill, my approach was to take on small, targeted campaigns in order to reform copyright with small victories.

I thought that was an important thing for me to talk to you all about today because we are all now off Capitol Hill. I think a lot of us saw the success of the campaign against the Stop Online Piracy Act (“SOPA”) and thought to ourselves, “How can we do something more than just stop legislation? How can we actually put something positive on the table?”

I wrote an article on *Boing Boing*, a technology website, in which I laid out my perspective and discussed what I saw as a cohesive strategy going forward. I said this fight is going to take engaging our generation. And it’s going to take a movement. To that end, allow me to suggest the following pointer: we cannot continue to stay on the defensive, watching and waiting for the next SOPA. If we slumber they will sneak provisions into law that effectively do the same things as SOPA. Therefore, the best defense is a solid offense.

Many provisions of SOPA have already been implemented through other means. For example, the United States government has used Immigration and Customs Enforcement to go after infringing websites. Lobbyists have been engaging in international treaty making, through the Trans-Pacific Partnership negotiations, to potentially filter Internet communication, implement a three strikes policy, and re-codify parts of the Digital Millennium Copyright Act. Private companies have also implemented the provisions of SOPA that allowed for the takedown of infringing websites and also cut off payment processors such as American Express, Mastercard, and Visa from supporting the infringing websites. These payment processors have largely cut off funding to those websites, in the absence of any law requiring them to do so. In my piece in *Boing Boing* I argued that we must analyze existing law because we will realize that our current laws (and regulatory structures)

are in some ways nearly as nefarious and dangerous as SOPA would have been.

We must recognize that progress will require support from both Republicans and Democrats alike and therefore we need to be strategic in our battle choices. We need to realize that while we may have different perspectives and different priorities, we need to focus on areas of common interest where we form a collective whole.

We must also recognize that in this fight for meaningful copyright reform, we are the insurgents, and so we need to be looking for those asymmetrical battles rather than taking on whole-hog, major, pie-in-the-sky reforms on day one. My first battle was on the issue of cell phone unlocking because I saw this issue as representing a major misstep by the “other side”—the big content industry side.

By way of background, on January 26, 2013, it became illegal for individuals to unlock their own phones. Unlocking your phone is a process by which you change the settings on your phone to allow you to use a SIM card (a card that essentially securely stores mobile subscriber data) from another carrier. Basically, you take an AT&T phone, and “unlock it” so that you may use it on another wireless carrier. This is a technology that is pro-free market and that exists in every cell phone market in the world, but is now illegal for American citizens.

It was made illegal because AT&T and Verizon asked for it to be illegal through their trade association, The Wireless Association. AT&T and Verizon spend \$32 million annually on lobbying, so it’s not surprising that they were successful. But it is surprising that there are over 100 wireless carriers on the other side of this issue, in support of unlocking, whose voices were ignored. Nonetheless, on January 26th, it became illegal for individuals to unlock their cell phones, and potentially 32 million Americans became felons and face the prospect of spending five years in prison and paying a \$500,000 dollar fine for simply unlocking their own phone. And I know the immediate response is “oh well, who’s going to enforce that law? It’s very unlikely that anyone would be arrested for it.”

In response, I argue that laws that are seldom enforced but could be enforced against everyone are the most nefarious. And so I led a campaign on this issue, first highlighting the issue in *The Atlantic* magazine and proving how the cell phone unlocking ban made a person who unlocks her phone liable for five years in prison. I helped to create a White House petition on the issue, which collected 114,000 signatures. But before I did that I reached out to members of Congress and said let’s get in front of this issue. Let’s just fix this problem. At the time I didn’t receive many substantive responses.

Once our White House petition reached 114,000 signatures (the first petition to get over the new 100,000 threshold), the White House

reversed its previous decision—a decision made by the Librarian of Congress through executive rulemaking, which banned cell phone unlocking—and endorsed cell phone unlocking. The FCC then announced an investigation into the matter. And now members of Congress are tripping over themselves to introduce legislation of their own. We now have four bills on the issue—H.R. 1123, H.R. 1892, S.467, and S. 481.

What this shows is that if you take an isolated asymmetrical battle and you demonstrate that there is a collective will to move forward on it and you make your legal case, you can often succeed in positive reforms.

I think there are many other battles like unlocking in the future. The next one I see on the horizon is dealing with accessible technology for persons who are blind and deaf. There is technology that could help persons who are blind and deaf to consume and enjoy media; but that technology is illegal for them to use. That doesn't make any sense. And in fact, the law is implemented in such a crazy way that there's an existing exception for technology, allowing them to use the technology, but the exception means that if a blind person develops the code himself then he can have closed captioning for a movie. That also doesn't make any sense.

The idea that closed captioning of movies, read aloud functionality for books, or phone unlocking has something to do with piracy and copyright is absurd. As a supporter of copyright, I think there's a way to move forward on these issues without touching the third rail of piracy. In so doing, we can create a coalition of the willing, and more importantly, have a discussion on Capitol Hill that leads to rational laws that protect copyright and deal with piracy without inhibiting innovation.

JESSICA LITMAN: A little bit of background: Congress has essentially delegated its copyright lawmaking authority to copyright lobbyists. This has been true for more than 100 years. When there's new copyright legislation, copyright lobbyists will get together to figure out what the bill should say, and they exclude from the bargaining table people at whose expense they hope to change the law. Those targets, though, find out about the effort, show up, and usually succeed in blocking the bill.

The Copyright Term Extension Act, for example, was opposed by bars and restaurants that resented paying money to the American Society of Composers, Authors and Publishers (ASCAP). This kept the Copyright Term Extension Act from being enacted for several years. Finally, the bill developed an exception that allowed sports bars to play copyrighted music without copyright liability. The WTO has determined that that exception violates the Agreement on Trade Related

Aspects of Intellectual Property Rights (“TRIPS”), but that was the price that bar and restaurant owners were able to exact from copyright owners eager to get the term extension law enacted.

Copyright lobbyists in this process never seem to invite the targets to negotiate over the bills, and never seem to take their interests into account, even though they must know that that makes it more likely that disfavored industry groups will be able to defeat the legislation. One reason for that, I think, is that copyright lawyers have learned that there is a strategic advantage in being able to design the shape of the initial bill. It’s easier to do that if the interests you hope the bill will inconvenience are not in the room.

The Digital Millennium Copyright Act (“DMCA”) is really a combination of several different bills, all pasted together in aesthetically unpleasing form. One of the pieces of that bill, the WIPO Treaties Implementation Act, contains the anti-circumvention provisions that Derek Khanna discussed in connection with cell phones and blind people. Those provisions were initially drafted by lobbyists for copyright owners. Another part of the DMCA is the Internet Service Provider Safe Harbor Notice and Takedown. Those provisions were initially drafted by representatives of telephone companies and Internet service providers. I think that copyright-owner lobbyists have decided that they didn’t get a good bargain with the notice and takedown system; meanwhile, the interests that negotiated exceptions to the anti-circumvention provisions have since discovered that most of the exceptions are useless. That may have lead to a sense that it’s important to control the design of the basic architecture of any copyright amendment, so that one can narrow the damage that other interests may be seeking to impose.

Another reason that important interests are excluded from negotiations may be that some copyright lobbyists have views on who is and is not a legitimate participant in the bargaining. In the aftermath of SOPA, Paramount sent out a corporate vice president to talk to law students all over the country. He came here, to Cardozo Law School. He also visited my class at Michigan. And, what we learned from his presentation was that the story that the motion picture studios were telling each other about what happened to SOPA was that Darth Google had whipped people into a frenzy by telling them lies about SOPA.

My students asked the Paramount vice president some questions about specific provisions in the bill that they found to be particularly unsettling. He responded that (as, he insisted, Darth Google knew full well), there had been a secret manager’s amendment that didn’t have those particular provisions. Paramount felt it was improper for ordinary citizens to respond to the text of the only version of the bill that had been made public, rather than to the secret manager’s amendment that

might not have been that bad.

One lesson that I take from this story is that studios may not have realized yet that readers, listeners, viewers, and other members of the audience are legitimate participants entitled to have views about copyright law. Indeed, the studios apparently haven't yet reconciled themselves to the idea that Darth Google is a legitimate player entitled to sit at the table and negotiate with them over the shape of copyright legislation.

Sherwin Siy has spent all sorts of time, successfully I think, getting Public Knowledge a seat at the table, but copyright lobbyists don't necessarily listen to what he says.

I can tell an optimistic story or I can tell a pessimistic story. The pessimistic story is that, gee whiz, the pendulum has now swung toward public involvement in IP policy and that feels great but, you know what, that pendulum is going to swing right back very soon.

Meanwhile, copyright lobbyists effectively control the lawmaking process. Now that they realize that ordinary people may make trouble, they have all sorts of great tools and strategies to respond to that threat. One strategy is to control the initial draft and then limit and narrow any exceptions. Another strategy is to embody what copyright owners want to do in a treaty. It turns out that copyright interests can maintain much more control and secrecy by going overseas and putting the provisions they hope to enact into domestic law into an intellectual property treaty. And while the White House has recently responded to two online petitions about IP policy—one , urging the administration to support an amendment to make cell phone unlocking legal and another to require open-access publication of federally-funded research—by voicing significant concern for the public interest, the administration also seems adamant that we've got no right to know what it is we're signing away in treaties about IP.

The optimistic story I could tell is this: Gee whiz, people seem to be paying attention to copyright law. Politicians might be beginning to pay attention to the fact that people are paying attention. The thing that's been missing has been ways to convey ordinary people's views about copyright policy to legislators in terms they can understand and will take seriously. Sherwin's organization, Public Knowledge, has been working hard to figure out ways to do that. The Electronic Frontier Foundation is another organization that has been harnessing public opinion and energy in constructive ways. You can look at the success of the two petitions as a sign that maybe at least the White House thinks that ordinary people are legitimate voices.

But the one thing I learned when I tried actually to do this in connection with the DMCA—as opposed to sitting in my ivory tower and writing about it—is that lawmaking is a job for professionals.

Amateurs screw it up. In the 1990s, a group of academics and public interest organizations joined forces to try to bring some sanity to the legislation that grew up to be the DMCA. Boy, did we screw that up. We had the best of intentions. But, you know, we got played. Copyright lobbyists whipped us.

RICK WHITT: Good afternoon everybody. It's a pleasure to be here. Thanks for the invitation. So since the late 1980's, I've been a practicing policy advocate in D.C.—that's a fancy term for lobbyist—first in law firm life, and then for a company called MCI Communications, which I think passed away before most of you were in elementary school. And then over to Google, and now at Motorola, which was acquired by Google.

I've also written a number of law journal articles, one of which, as was mentioned, is out in front there and will be published very shortly by the AELJ. So like other folks here on the panel, I have some idea of both sides of the debate here and around the politics of them.

I was trained as a political science major in college, and a guy named John Kingdon has written a pretty well-known book about how the political process really works—not just the way it can be seen from afar, but analyzing many examples of how the political process unfolds particularly in Washington D.C. He famously has talked about his own view, after looking at many of these examples and really digging deeply into the facts, that it is really ideas more than pressure that normally wins the day in Washington.

I consider him an optimist. I'm not entirely sure that he's correct. I think that a lot of the issues we're talking about now really amounts to the notion that at the end of the day, the truth of ideas will ultimately win out over the sort of inside game of the partisans in Washington, and in other capitols around the world as well. And SOPA/PIPA really helps crystallize that issue for us.

On the one hand it was a victory, right? Because of the Internet blackout day, we had something like fourteen million emails that were sent in to Congress. They were just overloaded—their servers, the phone calls, so that folks who had one day endorsed the bill ran away from it the very next day. I think it was Congresswoman Zoe Lofgren who said, “this was the first time a bill went from becoming inevitable to unthinkable in the course of a single day.”

That was because of the forces that were unleashed from the corporate side, from, of course, the nonprofit side, and many other folks, ordinary citizens, got engaged. It was an enormous success. But it's a success that I fear is difficult to replicate. I think it's one of these situations that was a crystallizing of concerns. It was a well-organized effort by a lot of folks. It hit at the right moment in time, just as the

White House was starting to have its own second thoughts about the situation. I think these demonstrations of power can be tough to harness. Then over time, in fact, they can often lose their novelty and their impact.

It is my concern that, yes, we won, but we won frankly because of political pressure that was put to bear on Congress. It was unorthodox, right; it was unusual. It was having the platform of the Net out there as the means through which, people organized and expressed themselves. But it didn't necessarily convince. It was convincing politically, but not intellectually.

This is where I come back to this notion of political pressure versus ideas. You know, there were dozens and dozens of Internet engineers who patiently sifted through the various legislative vehicles, of the language that was out there and the various drafts of the bills both in the House and the Senate. They then crafted testimony that was never heard. They submitted letter to members of Congress that I think frankly were never read.

They patiently and carefully pointed out some of the real issues with the legislation in terms of how it was going to mess around with the domain name system, and many of the key numbering and routing and addressing elements of the Net, in ways that were going to have pernicious effects on substantial innocent uses (i.e., folks who were not violating copyright law but would be deemed to be because the mechanisms would be way over inclusive). Ironically they pointed out that there were a number of technical countermeasures that could be employed by those who wanted to get around the mandates in the bill, which would thus render it ineffective. So they were trying to do their best to show even for those who didn't care at all about the potential overbreadth, that the legislation was just not going to do what they thought it was going to do in terms of effectiveness.

But those voices were not heard. And even today, you know, we have the lobbyists on the other side who are thinking, "well, gosh, we have to just harness the users the same way that this big bad Google and Wikipedia and others did." Maybe we can have five-minute commercials in front of every movie, shown in every movie theater across the country. We could tell our side of the story, right? We have that ability. That is our platform, so why don't we use that? So we still don't have a meeting of minds in terms of the notion that, yes, we can agree that the unlawful sale of content is a bad thing and we should try to find some reasonably effective measures to deal with that without otherwise harming innocent uses of the content.

Anyway, to me that is the sort of challenge we face, and my paper talks about that to some extent. The other bookend policy issue I'll mention quickly from last year, which we haven't really touched on

here today, is that the International Telecom Union (“ITU”) had something called the WCIT, which first I thought was a Broadway musical but, no, it’s actually the World Conference on International Telecommunications. And it’s a treaty organization. So again, as it’s been mentioned already, where you can go to get things accomplished, if you can’t get something through Congress as a national measure, then you typically go to treaty organizations. One of them, the Trans-Pacific Partnership, has already been mentioned. We’re in negotiations underway right now that might have some impact on copyright law. But we all don’t know about it because it’s all behind the scenes and behind closed doors and there are no drafts available for people to comment on.

Last year the ITU was looking at various ways of getting involved in Internet governance. This was a situation where fortunately, we got enough governments involved, and the U.S. government took the lead here and a number of others did as well, to push back on those efforts. But it would have been a quite serious and pernicious impact in terms of the United Nations essentially getting involved for the first time to say they want to dictate what the protocols and standards look like. They don’t care what the engineers who’ve been doing this for forty plus years now have accomplished in terms of the Internet Protocol (“IP”), Transmission Control Protocol (“TCP”), the World Wide Web (“W3”), and all the other elements of the inner workings of the Web. They would take it upon themselves to create the new mandates.

It’s breaking out in different places around the world, not just in the U.S., and it’s not just in the copyright area. I think this is a great debate, a great discussion we are having here today, and I look forward to a further conversation. Thanks.

SHERWIN SIY: So I guess I want to sound a note of optimism after this just, because I think, you know, I don’t want to disparage or minimize the work that these engineers did in writing these papers, putting together these letters and this testimony and getting that to The Hill because I think that actually had a good deal to do with priming a number of members offices, people who were in the middle who didn’t know a lot about the issue, who might have been sold, you know, co-sponsorship of SOPA or PIPA based on the fact that they were approached by their colleagues who said, yeah, this is uncontroversial, it’s just another copyright enforcement bill, you know, we want to make sure that there’s strong enforcement. You know, and that’s really about it.

They, you know, had been presented with a particular framework in this and maybe when they first received those letters they weren’t in a position to step out and challenge, you know, challenge leadership, committee leadership or party leadership on it, but then with--you know

that was enough for them and their staffs to get some idea that there was an actual controversy there. That there was another side and quite possibly more than two sides to this issue. Then when you had a public protest movement behind it, that gave those--that work beforehand, gives that movement more legitimacy in their minds. It gives them the knowledge that this is not just some sort of strange digital rabble pulling some sort of an elaborate prank.

One of the things that I wanted to talk about was the sort of instincts and assumptions that, you know, that might influence the way that Congress approaches these issues. I think that you've heard some of them already, you know, that there isn't as much of a left/right divide on it. There are differences in approaches as to how liberal versus conservative or libertarian approaches to copyright reform might come about.

There's the Silicon Valley versus Hollywood sort of dichotomy that people draw upon that frankly a lot of members do see as a real thing and, you know, when they are being presented with lobbyists from Silicon Valley and from Hollywood, well this is the framework they're going to take. They will try, if they are being earnest about it to look at both sides of this issue when there are also the sides of consumers, publishers, libraries, cable distributors, all sorts of other people that might not make it in that room and that's how you end up with things like the Copyright Alert System.

I think that one of the other dichotomies that sort of presents itself, a series of assumptions that policymakers will have has to do with the distinction between copyright as being a specialized system that applies to a few different types of players and a generalized system that applies to everyone. There's a few anecdotes that I think kind of illustrate this.

Maria Pallante, Register of Copyrights, was testifying before Congress fairly recently about basically the next great copyright act, sort of a fundamental reimagining of what the copyright law should look like. There was, in the middle of her testimony, some comment, she actually talked about how copyright debates have become much more contentions in the years that she's been working in it. She was thinking perhaps this is due to the fact that there's more money involved. There's more lobbying.

There seemed to be, and maybe I'm ascribing this to her, but it struck me that she seemed to have a sort of nostalgia for the past where you would have, you know I think--again this is my imagining of her nostalgia but I'm imagining that, you know, she is envisioning this room full of esteemed copyright scholars debating finer points of the law, trying to get everything right. It's the people, the scholars involved, the repeat--the people who are involved in repeat transactions with

intellectual property and so on, a collegial atmosphere.

In my--I take a look at that room and what I'm imagining that room looked like in the 50's and 60's and 70's and I think of a collusive atmosphere. Not in the antitrust sense necessarily but, you know a club, right? It's a place where you have implicit rules and norms as well as explicit rules which end up in the statute.

A couple of examples that I think illustrate that, you know fairly recently I was a guest lecturer, I don't know, at a seminar class of a noted copyright scholar. I mentioned the fact, we were talking about the first sale doctrine and Kirtsaeng I mentioned just sort of in passing like, you know look, the distribution right is weird. It's just very strange the way we do this and the way that Section 109, you know, the first sale doctrine is codified is very strange.

You can become a copyright infringer by not returning your friend's DVD and then putting it up on eBay. That makes you a copyright infringer, not just a thief. And she just had a very hard time believing this until I actually went back and said I'm pretty sure that's right, looked up Section 109 on my laptop and said, no, no, you have to be the owner of the particular copy in order to have the first sale doctrine apply to you. She said, well, okay, that's interesting and she used that as a teaching moment to tell of her students and that is why you must always go back to the text.

At the same time though she also said, still, really, who's going to bring those suits. Who's going to make that? Who's going to make those claims on those grounds? The same thing happened in Kirtsaeng itself. We would argue with people. One of our favorite parts in our amicus brief was we cited that fact that how many donations Toys for Tots gives out, right, and there are copyrighted works embedded in toys, you know logos, designs, copyrighted text, software built in certain things.

Somebody said, well, nobody's going to sue Toys for Tots. I think maybe not Toys for Tots, maybe not at first but certainly people will sue individual consumers. And that's because we have in landscape where it's not just a series of colleagues and a series of repeat transactors dealing with each other. It's a case where you're not talking about a major studio talking with a major broadcasting network in every case.

In each case you're also talking about much smaller entities and individual consumers who now stand in the shoes of being the distributors of and the competitors to people who hold copyrights. So the fact is you know people are going to get sued. You've got new players. You've got consumers, users, hobbyists, and those people are going to get sued also because enforcement and I realize this is going to be controversial, enforcement is easier than ever, certainly by

percentage.

The number of infringing acts that are going to be visible by virtue of being networked is a lot higher than anything that happened in the past, right? People aren't going to be--aren't switching--aren't swapping mixed cassette tapes and fewer mix CDs. They're sharing those things online and that's more visible so it's actually a higher percentage of enforcement is possible.

Now the numbers of infringing acts that won't be enforced I would estimate probably, just taking a wild guess, probably will increase just because you have more works and more networking available. But of course, you know, all of those facts are very fuzzy because the studies we have are all over the place and sometimes suspect methodology.

The point that I want to get at with those anecdotes about the assumptions people have is that those are the assumptions that are baked into the heads of legislators. And it's those attitudes that we're going to be wanting to challenge. The other thing I want to close with is the idea that copyright reform is coming. The fact that we have the Registrar of Copyrights saying that it's time to take a fresh look at these things means that we are going to be addressing these issues and not just the DMCA, not just circumvention and safe harbors, also possibly the framing of 106 rights generally, right?

Look people recognize that our system for digital, audio, public performance being wildly different from non-digital, audio public performance, that's very strange and sort of an artifact and something that probably shouldn't be distinguished in this way. There's a lot of fundamental questions that are coming up. One of the things that I'm hearing, that I hear a lot, in D.C. from people who I tend to side with a lot of the time is basically don't open up these issues.

If we open up this debate, we might lose ground. I think if you're saying that and I'm not saying you shouldn't be strategic but I do think if you're saying that you are essentially saying the copyright law is as good now as it ever will be. If that's the case I really should be looking for a new job. Thank you.

JESSICA LITMAN: I think as a historical matter, members of Congress, rather unreflectively, appear to have believed that the copyright statute did not in fact make individual readers, listeners, and viewers liable for copyright infringement. You can find clear evidence of this as recently as the early 1990s. Why did they think that? Did they think that it was fair use? That's unclear, but there seems to have been a general consensus, also shared by the Copyright Office, that the copyright law didn't make individual, personal copying illegal. There is, I think, still some political salience to the idea of readers' rights, listeners' rights,

and consumers' rights. I think that the first sale story is an effective story about the rights of readers and consumers. Many members of Congress may be willing to respond to that sort of story. Some of the pushback from the DMCA came from questions and stories about people who used bookmobiles. Members of Congress asked proponents of the DMCA whether the law would make bookmobiles illegal. So, to the extent that this can be expressed as a problem that Joe Constituent is going to have, I think that's one wedge that may actually be effective. Congress has not yet sat down and said, "Oh gee, there's all this piracy. I know what let's do; let's make every citizen in the United States liable for thousands of dollars in statutory damages."

AUDIENCE MEMBER: [inaudible question]

RICK WHITT: That's a good question that I don't agree with the premise of. So, yes, there are some good arguments that a number of the countries that weighed in on in favor of proposals to have the ITU become more involved in Internet governance. They are concerned that the United States, through the contract it has with the Internet Corporation for Assigned Names and Numbers ("ICANN"), and through its general influence as being one of the original originators and funders of the Internet, has too much sway and needs to be pulled back, and that the way that the Net is governed should be done in a much more multilateral fashion.

The problem is, from my perspective at least, the ITU is the wrong kind of instrument to be using to do this kind of thing. The ITU is a government-to-government treaty organization. Private citizens and individuals cannot become members of the ITU. Their deliberations typically are not made public, so the transparency is pretty weak. Third parties are typically not invited. Companies, corporations, and certain other entities can become members, but they'd have access only to a limited number of documents so it's not really a great place to have these kinds of open conversations.

Then you look at the contrast of where are these decisions being made. ICANN is sort of unto itself, but really what ICANN does is around the domain name system and a few areas around the top-level domains, it's actually relatively limited. I would argue that most of the power of the Internet's architecture has come from what economist Eleanor Ostrom has called the polycentric governance groups, and that's the Internet Engineering Task Force ("IETF"), and the World Wide Web Consortium ("W3C"). These are the groups of engineers, in most cases volunteers, and they increasingly come from corporations but represent themselves as individuals. They get together, their proposed standards and protocols are freely distributed, made available

ahead of time, and people can comment on them. People can come to the meetings virtually. They can come there in person. The process that they've used over the years have yielded some tremendous benefits in terms of the actual protocols, the openness of IP, and of the principles and the other things that are embedded now into the Internet.

Those are the very things that are under attack at the ITU. What I would submit is that the ITU is both the wrong kind of instrument and the kinds of ways that they were thinking about going about exercising authority against the U.S. They would have had serious damaging lasting effects on the Internet.

MICHAEL BURSTEIN: Maybe I'll invoke my moderator's privilege to ask the following question and bring our discussion back to the theme of the symposium, which is moving from scholarship to activism to political change. So I'm curious, particularly those of you who have spent time on The Hill, Jessica told sort of cautionary tale with respect to the DMCA about policy being made by professionals, and Derek told or sort of juxtaposed the need for kind of broad frameworks with the need for sort of targeted, you know, asymmetrical particular bites that are winnable. My question is the following: for those of us who inhabit the legal academy, is what we write in law journals at all relevant? And to the extent that those of us who write articles that appear in law journals do so out of a desire to help change things and to actually have an impact on policies, if you think the answer is no or not really, what more can we do to make what we do more relevant to the policy process? What are the gaps that legal scholarship *can* fill?

RICK WHITT: I can start on that one and I'll go back to the person I mentioned earlier, John Kingdon, the political scientist. He has a memorable phrase; he talks about "the garbage can of politics." What he means by that is there are these different sorts of elements all mixed together in the political scene. He separates them out into three basic "policy streams," as he calls them.

The first stream is the notion of identifying problems—that's what lots of members of Congress like to do, find things that are wrong with America and be seen as helping to fix them. Once you identify the problem, the second stream is then to identify what the solution might look like. Then the third stream is the actual political process that is engaged to actually get to that end game of the solution being enacted as law and implemented.

What he talks about—and I think it makes a lot of sense, frankly—is that you need to have all three of those streams to be successful. The problems identified tend to be something that occur sporadically. So there are all these sorts of policy windows that occur. Maybe it's some

sort of national tragedy, some big event that galvanizes attention; maybe it's a slow, steady movement of people starting within the general populace, a certain view about something that they didn't have previously. Whatever it is, there's something that creates this effect of an opportunity, a temporary window, for something to happen.

Once that something happens, then you have this sort of competition among different types of solutions that are being proposed. Obviously politics is involved here too, but really I think at this point again, members of Congress often really do want to understand and try to come up with good solutions. They have their prisms like all the rest of us do, in terms of how they look at things, but that's the point at which I think what happens in academia can be translated into actual solutions, and then harnessed by folks at organizations like Public Knowledge, companies like Google, and others who are out there trying to articulate what they think is right for the public good. Then the political process engages; whether it's successful or not involves lots of variables there as well.

If you think about it in that context, there really is ample room for academia to become engaged. And then turning to the political side of it, we need to find out how to harness the forces like we had with SOPA/PIPA, like we're having now with the cell phone locking issue. We need to start to get people engaged from the bottom up, not the top down, to be effective advocates to try to make these kinds of changes.

SHERWIN SIY: I guess I would just be giving my impressions, but staffers aren't going to read a law review article, right? I mean if I write something that's five pages long it's too long, cut it down. They have time for one page. That's not to disparage them at all because what they have on their plate is impressive in terms of what they need to process in a day.

That doesn't mean that those law review articles are useless because they provide the backing for shorter pieces that can come out of the academy, can come from professors, can come from anybody really but they provide the necessary background and the necessary actual research that gives those arguments credence. Literally you will see proposals coming out of offices, right, that have ideas, concepts within them, and they're not entirely sure where they came from. You'll see them, these ideas proposed in papers 10, 15 years old.

JESSICA LITMAN: As someone with no Hill experience whatsoever, I think something that academics can do (easier once you have tenure than before you do) is to write and talk about the problem in ways that infect other folks with the virus of your idea so that they don't even know where it comes from, but other people catch it.

AUDIENCE MEMBER: [inaudible question about cell-phone locking legislation]

DEREK KHANNA: With the unlocking issue in particular I wanted to engage in civil disobedience but people were very scared of being arrested for unlocking their phones.

I feel like the IP community is a community that's not as acclimated to the tools of civil disobedience as other communities have been in the past. Maybe that's a broad statement but that's my impression. If you disagree with me and you want to join me in engaging in civil disobedience and getting arrested in the Library of Congress, let me know, because I will join you.

JESSICA LITMAN: It is worth noting that the Organization for Transformative Works started out supporting what seemed at the time to be civil disobedience. It actually succeeded in nudging the law several inches towards sanity. Back when OTW decided "we're going to post your fan works in an archive on the Internet even though most people don't think it's legal to do that," it took an enormous legal risk, although it spoke for a community of committed folks who were going to be doing what they were doing anyway.

SHERWIN SIY: Carl Malamud's digitizing, you know, copyrighted building codes that have been incorporated by reference into municipal and state codes. He's putting them up online. I don't think his objective is to get sued. I don't think he wants to be a test case but he's doing it. And as he does it I mean I think we saw this with D.C. recently with the District of Columbia's laws. He digitized them, told people he was doing that, put them up online, and D.C. recently said, oh, you know what, yeah, we will put an unofficial version of the code on our website. I there's definitely room for it. I think that it depends upon what—where you're doing this. I mean it's easy for somebody to be characterized as wrapping themselves in the mantle of civil disobedience when they want a free album. There was an essay somebody wrote fairly recently and I wish I could remember who so I could cite them properly talking about Thoreau and the origins of--and his essay and the fact is he went to--he was in prison because he refused to pay taxes to support the Mexican War. The connection between what law he was violating and his political objective was not quite as distinct as I think we normally would want an act of civil disobedience to be, to send the message about that, right? I mean just because--anybody with a generalized grievance against the government stops paying taxes and the you know your tax, I'm sorry, you're not paying taxes. You're a...

Right. I mean--yeah, he's a Committee chairman but his district is his district, right? The people who are voting for or against him are in that particular area. Their interests, unless it's a particularly copyright nerdy district, these issues aren't going to be election issues generally. Not yet.

RICK WHITT: I was going to just point out that the very nature of what it is to be disobedient in a civil manner, you know, what does that mean now in the age of the Internet? It's about acts, about posting your things online. It's about saying things online. It's less about getting arrested in the halls of the Library of Congress, which I think can still be every effective, but it also to me means if you're trying to make a point with members of Congress who tend not to be as technically savvy, it may not have the same kind of impact as chaining yourself to the Library of Congress walls and refusing to leave.

Think about SOPA/PIPA again, that was in large sense a virtual protest. You didn't have thousands of people in the streets with big banners. It was people basically sending emails and websites going down or putting up particular points of view on their opening pages. What it is to be civil disobedient in the twenty-first century, I think is a really fascinating question, particularly because of this chasm between the folks who have now the tools of the Internet and the people, the audiences, we're trying to reach in Washington who oftentimes don't really get it.